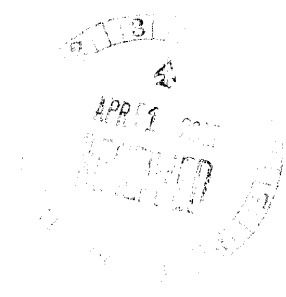


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**BEFORE THE
SURFACE TRANSPORTATION BOARD**



**EX PARTE NO. 656
MOTOR CARRIER BUREAUS - PERIODIC
REVIEW PROCEEDING**

**REPLY COMMENTS
OF
MIDDLEWEST MOTOR FREIGHT BUREAU, INC.**

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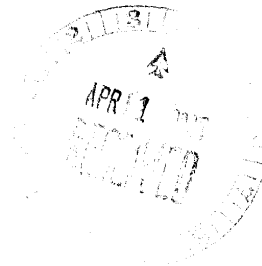
**Counsel for Middlewest Motor
Freight Bureau, Inc.**

Dated and Filed: April 1, 2005

ORIGINAL

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**EX PARTE NO. 656
MOTOR CARRIER BUREAUS – PERIODIC
REVIEW PROCEEDING**



**REPLY COMMENTS
OF
MIDDLEWEST MOTOR FREIGHT BUREAU, INC.**

Middlewest Motor Freight Bureau, Inc. (MWB or Middlewest) files these Reply Comments in response to the Comments submitted jointly on behalf of National Small Shipments Traffic Conference, Inc., and National Industrial Transportation League (hereinafter "NASSTRAC/NITL" or "Shipper Associations"). Attached hereto is the Verified Statement of Mr. Jeffrey D. Michalson which responds to the Comments of Shipper Associations. Comments have been filed by other motor carrier bureaus in support of continued immunity.¹ Only NASSTRAC/NITL have filed substantive comments in opposition to the continuation of STB approval of the ratemaking agreements that are the subject of this proceeding.²

¹ EC-MAC Motor Carriers Service Assoc., Inc., Household Goods Carriers Bureau Committee, Machinery Haulers Assoc., National Classification Committee, Nationwide Bulk Trucking Assoc., Inc., North American Transportation Council, Inc., Pacific Inland Tariff Bureau, Inc., Rocky Mountain Tariff Bureau, Inc., Southern Motor Carriers Rate Conference, Inc., and Western Motor Tariff Bureau, Inc.

² A number of shippers in the lighting industry have filed comments in opposition to National Classification Committee Agreement. However, those comments do not specifically address any of the bureau ratemaking agreements.

NASSTRAC/NITL argue that antitrust immunity for motor carriers should be eliminated or restricted. As we explain, infra, their arguments are the same as those advanced to and recently rejected by the Board in the last review cycle addressing collective ratemaking and commodity classification in Section 5a Application No. 118 (Sub-No. 2), er al., EC-MAC Motor Carriers Service Association, et al., served November 20, 2001 and March 27, 2003. (EC-MAC).

NASSTRAC/NITL's position is based on a philosophical disagreement with Congress over whether antitrust immunity should exist. Congress, of course, has clearly and consistently expressed its position on the issue. Beginning in 1948 when it initially authorized antitrust immunity for collective rate and classification actions through the present, Congress has examined, re-examined, and affirmed its approval of immunity. Congress abolished the Interstate Commerce Commission in 1995, but nevertheless continued the effectiveness of collective ratemaking and classification agreements while transferring oversight authority to the Surface Transportation Board. See ICC Termination Act of 1995, P.L. 104-88, § 103, December 29, 1995.

In 1999, in the midst of the STB's consideration of continued immunity, Congress again examined the subject and expressed its approval of collective ratemaking in the Motor Carrier Safety Improvement Act, Pub.L. 106-159, December 9, 1999. In fact, the STB was requested to hold its administrative proceeding in abeyance while Congress took up the issue. As a result, Congress not only continued collective ratemaking, it also extended the STB's review cycles to 5 year periods. Most recently, in 2003, Congress amended the collective ratemaking provisions of the Act by removing the prohibition against the Board taking any action that would permit the establishment of

nationwide collective ratemaking authority. Pub.L. 108-7, Div. 1, Title III, § 354, Feb. 20, 2003.

While Congress has fine-tuned these provisions on several occasions over the years, it has continually authorized collective ratemaking for nearly 60 years. The Shipper Associations have refused to accept this determination. Importantly, they have not presented any facts or circumstances to support the elimination or further limitation of immunity.

Their arguments paint an inaccurate picture of the regulatory structure governing collective ratemaking. They argue that shippers have no or limited recourse to challenge collectively established motor carrier rates. Comments, pp. 8-9. However, the statute is explicit in its reasonableness requirements and the remedies for violations thereof. Section 13701 (a)(1)(c) requires that all collectively established rates, rules, and classifications be reasonable. The Board's powers over Bureau actions not in the public interest are broad and far reaching. Section 13703 (a)(5). In addition, private remedies and the procedures to pursue them are available for shippers to challenge rates before the Board and in the courts. 49 U.S.C. §§ 14701, 14704, and 49 C.F.R. Parts 1130 and 1132.³

Notwithstanding their inability to demonstrate any inadequacy in the structure of the Act, the Shipper Associations urge that the Board should act to prevent or deter abuse, rather than require shippers to rely on the remedial provisions of the statute itself.

³ NASSTRAC/NITL cite *Miller v. WD-40*, 29 F.Supp.2d 1040 (D. Minn. 1998) for the proposition that there is no recourse to the STB to challenge the reasonableness of motor carrier rates (Comments, p. 8). This is an odd contention. In refusing to refer the shipper's claim of rate unreasonableness to the STB, the Court noted that the sole issue in the case was rate applicability - not unreasonableness. 29 F. Supp.2d at 1043. Further, the Court acknowledged that the reasonableness of collective tariffs is within the STB's jurisdiction, but held that the shipper failed to meet its burden for referral. *Id.*, 1045. In short, the Court's refusal to refer the case to the Board turned on the particular facts of that case.

There is no factual basis for this suggested course of action. In the first place, there is no evidence of any abuse in the collective ratemaking system. And second, there is no evidence that existing statutory remedies are inadequate. Unquestionably, the Board is authorized to change or impose additional conditions in an agreement "when necessary to protect the public interest". 49 U.S.C. 13703 (c). However, the Shipper Associations have not established the existence of any circumstances that would warrant additional conditions.

The focus of NASSTRAC/NITL's comments is on the bureau class rate level. Their argument is curious in view of the individual carrier discounts and Bureau discount rule which relegate the class rate level to a benchmark. In any event, this proceeding was commenced to review collective ratemaking agreements. Any challenge to the existing rate levels maintained by the bureaus is more appropriately considered in a rate proceeding, based on a factual record addressing issues that are relevant to the rates under attack.

The rate conditions that the Shipper Associations urge be attached to the continued approval of the bureaus' agreements have previously been considered and rejected by the Board. Their request for prescription of a mandatory minimum discount continues to be ill-founded. The Board's authority to prescribe rates requires a finding that the existing rates are unlawful in violation of Section 13701 (a). See Section 13701 (b). That threshold finding does not exist here.

Furthermore, NASSTRAC/NITL ignore the fact that discounts are individually negotiated and established. Imposition of a mandatory bureau minimum discount rule would supercede individual discounts, foreclose a carrier's right of independent action,

and disrupt existing relationships. It was essentially for these reasons that the Board rejected shippers' calls for a mandatory bureau discount in EC-MAC. The Board stated that it had no desire to interfere with the arm's length transactions negotiated between carriers and shippers. See EC-MAC, served November 20, 2001, p.7. The Board also explained that it would be inappropriate to require a minimum discount at any particular level given the broad range of rates and discounts throughout the industry that reflect the wide variety of competitive circumstances. Id.

The Board's rationale continues to be appropriate today. While the Shipper Associations request the Board to reconsider its position, they have not demonstrated any change in circumstances to warrant a different conclusion than it reached in EC-MAC. NASSTRAC/NITL attempt to attach some significance to the fact that the range of discount information filed with the Board indicates that some bureau carriers individually offer discount levels less than the automatic discount provided by bureau rule. This is neither remarkable nor a changed circumstance. As explained in the attached statement, it reflects the same conditions that existed when the minimum discount rules were put in effect and which the Board acknowledged in EC-MAC. ("... not every shipper would be able to negotiate a discount as steep as the average discount offered today." Decision served November 20, 2001, p.7). Individual discounts less than the bureau discount as well as discounts stated in different terms simply reflect the market at work.

The Shipper Associations also ask the Board to reconsider its refusal to adopt a rebuttable presumption of unreasonableness for bureau class rates. Not surprisingly, they present no facts or argument to support adoption of such an unusual rule. In fact, it

turns the entire statutory scheme on its head. The NASSTRAC/NITL suggestion would convert rates that were lawfully adopted, never challenged, and currently in effect into rates that are presumptively unlawful. Not only would it retroactively expose carriers to liability on past shipments, it would reverse the burden of proof. The statute has always attached a presumption of lawfulness to effective rates and places the burden of demonstrating unlawfulness on the party challenging them. Louisville N.R. Co. v. United States, 238 U.S. 1, 11, 35 S. Ct. 696 (1915). There has been no relevant change in the law that would allow the Board to reverse that presumption.

The Shipper Associations seek to create this unique presumption of unlawfulness without challenging a single rate or its application to a single shipment. Not only would they relieve shippers of their statutory burden, application of the presumption to produce a finding that bureau rates used only as a benchmark are unlawful would completely undermine the benchmarking system. Plainly, the suggested presumption is contrary to law and unwise as a matter of policy.

Continuing their attack on the bureau rate level, NASSTRAC/NITL urge that antitrust immunity for collective action on general rate increases be limited to cost recovery. (Comments, pp. 12-13). Again, the Shipper Associations ask the Board to go far beyond the limitations and restrictions imposed by Congress, but provide no facts or circumstances that would warrant such a change in conditions imposed in the carriers' agreement.

Like their other arguments, this suggestion is contrary to the statute. In authorizing the Board to impose reasonable conditions on collective ratemaking agreements, Congress directed that any condition further the transportation policy set

forth in Section 13101. See 49 U.S.C. § 13703 (a) (3). Among other things, the transportation policy expressly seeks to enable efficient and well-managed carriers to earn adequate profits, attract capital, and maintain fair wages and working conditions. 49 U.S.C. § 13101 (a) (2) (F). The condition advocated by the Shipper Associations to prohibit general increases based on carrier revenue need flies in the face of this directive. Congress' authorization of collective ratemaking in section 13703 (a)(3) specifically contemplates general increases based on carrier costs and revenue need including reasonable profit. Historically, revenue need sufficient to enable carriers to generate a reasonable profit was always a relevant factor in determining the reasonableness of a collective ratemaking action.⁴ NASSTRAC/NITL's suggested condition is inconsistent with, if not plainly contrary to law.

The Shipper Associations also contend that the Board should require more transparency in the bureaus' operations by providing notice of rate increases, as well as the opportunity for shippers to comment and/or attend meetings at which rate actions are discussed. Comments, p. 13. These requirements already exist in bureau agreements and have since 1980. See Ex Parte No. 297 (Sub-No. 5), Motor Carrier Rate Bureaus, 364 I.C.C. 464. MWB strictly adheres to the requirements of its Agreement in addition to posting notice on its website and affording any person the opportunity to receive notice directly by email. Moreover, shippers have always been invited to attend and comment at MWB's rate meetings.

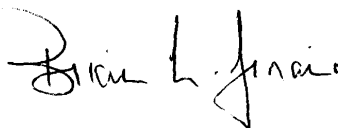
⁴ Prior to the 1995 Termination Act, the statute specifically included "reasonable profit" as an element of the reasonableness of a collectively established general rate increase. Former 49 U.S.C. § 10701 (e). Furthermore, revenue need is still included as a relevant consideration in the Board's regulations applicable to general revenue proceedings when tariffs must be filed. 49 C.F.R. Part 1139.

Along these same lines the Shipper Associations suggest that bureau carriers get away with "stealth" rate increases that shippers never know about. Such a contention is hardly credible. Indeed, this may be more of a problem for a shipper using a non-bureau carrier than one using a bureau member. As the attached statement indicates, bureau increases are well publicized before and after rate action is taken. It would be very difficult, if not impossible, for a bureau carrier to keep a shipper in the dark about a rate increase.

CONCLUSION

The comments of NASSTRAC/NITL reflect the same arguments they advanced in the recent review cycle just concluded in EC-MAC. The Board properly rejected their contentions then and should do so now. The Shipper Associations have not set forth any new or changed circumstances which would warrant a change in the Board's position or would otherwise justify the imposition of any condition urged by NASSTRAC/NITL.

Respectfully submitted,



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Dated and Filed: April 1, 2005

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**EX PARTE NO. 656
MOTOR CARRIER BUREAUS –
PERIODIC REVIEW PROCEEDING**

**VERIFIED STATEMENT
OF
JEFFREY D. MICHALSON**

My name is Jeffrey D. Michalson and I am President and Chief Executive Office of Midwest Motor Freight Bureau. I have reviewed the joint statement submitted on behalf of National Small Shipments Traffic Conference and National Industrial Transportation League (NASSTRAC/NITL) and offer this response.

NASSTRAC and NITL object to collective ratemaking on the ground that it facilitates “stealth” rate increases (Comments, p.6) and they urge that more transparency be required with respect to bureau proceedings (Comments, p.13). These contentions are surprising in view of the strict procedures that bureaus are required to follow. Following the 1980 Motor Carrier Act, Midwest’s Agreement was amended to comply with the ICC’s requirements governing notice of meetings at which proposed collective rate actions would be considered. We strictly adhere to the requirements of our Agreement.

As pertinent, Article XX of our approved Agreement requires 15 days advance notice of the time and place of meetings at which proposed general increases are to be considered. This information is contained in our docket bulletin which is mailed to all

subscribers. Notice of such meetings is also posted on our website. In addition, any interested person may register on our website to receive notices directly by email. Disposition notices are similarly announced. Midwest's ratemaking activities are conducted out in the open at meetings where anyone who cares to can attend and participate. Shippers are welcome to attend and regularly attend meetings of our General Rate Committee.

Consequently, the contention that the collective ratemaking process somehow facilitates stealth rate increases rings hollow. Such information is public and readily available to shippers. Contrary to NASSTRAC and NITL's argument, most shippers are well aware of bureau rate increases. They also have the means to minimize or negate an increase by adjusting their individual discounts or freezing the benchmark level by a contractual provision. Of course, any carrier can choose not to disclose its rate increases but that has nothing to do with the collective ratemaking process. In fact, in view of the sunshine requirements governing rate bureaus discussed above, it is easier for a carrier acting independently to keep a shipper in the dark than it is for a bureau carrier.

NASSTRAC and NITL argue that a mandatory minimum discount should be imposed—an idea that the Board previously rejected. They contend that the existing rules voluntarily adopted by the bureaus are not working. For example, they point to our 35 percent discount rate while some of our members only offer a 25 percent discount. (Comments, p. 12).

Midwest's discount rule was adopted in 1999 in response to NASSTRAC's protest of the general increases of several bureaus, including ours. The rule clearly provided that it would apply to undiscounted class rates, including minimum charge

shipments, but would not apply to any shipments already subject to a discount. The Board was well aware of the application of the rule when it rejected NASSTRAC's request for an automatic minimum discount rule in the last review cycle. See EC-MAC decision served November 20, 2001, p.6, notes 12 and 13.

MWB carriers adopted the rule in this format for essentially the same reason that the Board previously declined to prescribe a minimum discount, i.e., it would be inappropriate to interfere with the existing arrangements individually negotiated by carriers and their customers. The carriers were aware that discounts that were individually negotiated reflected the particular circumstances of each shipper's traffic. It is important to understand that carriers offer discounted rates in terms other than discounts from bureau class rates. For example, carriers waive accessorial charges, or assess FAK rates as other means of discounting. The Board understood the wide variety of individual price options available and refused to mandate any particular "one size fits all" rate. Id., p.7. Contrary to the Shipper Associations' assertion, the system is working the way it is intended – with pricing that reflects each shipper's requirements.

NASSTRAC and NITL also argue that a presumption of unreasonableness should attach to the bureau class rate level. (Comments, p. 11). This argument reflects a lack of understanding of collective ratemaking system. Middlewest's rate structure was developed, maintained and justified on the basis of carrier costs and revenue need under the tight controls and oversight of the ICC. When the ICC was abolished, we did not cast aside the existing rate structure or the factors relied upon for its maintenance. The statute still imposes the reasonableness requirement for collectively established rates. We continue to follow these requirements in maintaining a rational and reasonable rate level.

Middlewest's existing rate level has not been found unlawful and there is no basis for adoption of a presumption that it is unlawful.

Along the same lines, the shippers contend that bureau carriers should be prohibited from taking collective action on increases based on factors other than costs. The statute, former section 10701 (e), and ICC regulations have traditionally embraced carrier profit as an element to be included in consideration of the reasonableness of collectively established rates. The collective ratemaking provisions of the statute specifically reference the National Transportation Policy, which in turn, seeks to allow carriers to earn adequate profits, attract capital and maintain fair wages and working conditions. There is no indication in the law that such factors can no longer be considered in establishing a reasonable level of rates.

VERIFICATION

I, Jeffrey D. Michalson, declare and verify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to submit this statement.

DATED: 3/29/05


(Signature)